

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0379
Income Tax Withholding
For the Years 1997 - 2003

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ISSUE

I. Income Tax Withholding—Employees compared to Independent Contractors

Authority: IC 6-8.1-5-1(b); IC 6-3-4-8, IC 6-3-1-5, IC 6-3-1-6, GKN Co. v. Magness, 744 N.E.2d 397 (Ind. 2001), Information Bulletin #52.

Taxpayer asserts that he hired independent contractors and not employees—and thus was not required to withhold Indiana state and local income taxes.

STATEMENT OF FACTS

Taxpayer rents gaming tables and provides the dealers for the tables as entertainment for corporate events. The games include blackjack, craps, roulette, Caribbean stud poker, Let-it-Ride, and money wheel. A withholding tax audit was completed and the Department assessed state withholding tax and county withholding tax—determining that Taxpayer hired employees, not independent contractors. Taxpayer filed a protest and a hearing was held.

I. Income Tax Withholding—Employees compared to Independent Contractors

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-3-4-8 requires an employer to deduct and withhold from each employee's wages the Indiana adjusted gross income tax and any county income tax due. The employer is required to submit those withheld taxes to the Department. *See id.* If an employer fails to withhold state and local income taxes on wages paid to employees, the taxes are assessed against the employer and the employer is liable to pay them. *See id.*

IC 6-3-1-5 defines "employer" as defined in section 3401(d) of the Internal Revenue Code. IC 6-3-1-6 defines "employee" as defined in section 3401(c) of the Internal Revenue Code. Since Indiana tax code ties its definitions of "employer" and "employee" to the definitions given in federal tax code, it is appropriate to use the IRS guidelines to determine whether Taxpayer's workers were employees or independent contractors.

The IRS has developed a 20 factor guideline—based on the common law—to help determine whether a worker is an employee or an independent contractor. The Department's audit report

summarized the 20 factors and the ones bolded below are the factors that the auditor noted as applying to Taxpayer:

1. **Must comply with employer's instructions about work**
2. Receive training from, or at the direction of, the employer
3. **Provide services that are integrated into the business**
4. **Provide services that must be rendered personally**
5. Hire, supervise, and pay assistants for the employer
6. **Have a continuing working relationship with the employer**
7. **Must follow set hours**
8. Work full-time for the employer
9. Do their work on the employer's premises
10. Must do their work in a sequence set by the employer
11. Must submit regular reports to the employer
12. Receive payments of regular amounts at set intervals
13. Receive payments for business or traveling expenses
14. **Rely on the employer to furnish tools and materials**
15. **Lack a major investment in facilities used to perform service**
16. **Cannot make a profit or suffer a loss from their services**
17. Work for one employer at a time
18. Do not offer their services to the public
19. Can be fired by the employer
20. **May quit work anytime without incurring a liability**

Not all the 20 factors apply to a particular situation, but are applied when relevant. In this case, the workers do rely on Taxpayer to furnish the gaming tables, cards, dice, and other equipment. Taxpayer confirmed this. The furnishing of these tools and equipment by Taxpayer to the dealers is a strong indicator that these are employees. The services provided by the workers are integrated into Taxpayer's business; Taxpayer supplies the gaming equipment and often times also is responsible to provide dealers. The gaming tables and the dealers are an integrated and interconnected part of rendering the event services. Concerning rendering services personally, Taxpayer stated that he calls those who have worked for him before whom he liked the quality of their work, and also has asked if they know others who can work the tables. Calling the person is a request for personal services; asking for referrals for others is common among employers when seeking additional employees.

Taxpayer stated that when the workers arrive and ask where to they need to go, he tells them to find a table they like; he does not assign them to tables. Taxpayer forwards that this practice is indicative that the workers are not given directions by him. As well, Taxpayer stated that he does not set the hours a dealer needs to work when he contacts them, but merely states to them when the event is to begin and to end; they can choose when to arrive and leave. However, implicit in stating the hours of the event is a direction by him as to the hours he expects them to be there.

Taxpayer has acted in good faith to try establish the workers as independent contractors. He has each dealer sign an agreement when arriving to work an event which states:

1. **The undersigned shall be deemed an independent contractor and is not an employee, partner, agent, or engaged in a joint venture with [Taxpayer].**

2. **Consistent with the foregoing, [Taxpayer] shall not deduct withholding taxes, FICA, or any other taxes required to be deducted by an employer, as I acknowledge my responsibility to pay the same as an independent contractor.**
3. **I further acknowledge that I shall not be entitled to any fringe benefits, pension, retirement, profit sharing, or any benefits accruing to employees.**

However, the determination of whether a worker is an employee or independent contractor is not made by the statements and agreements of the parties, but by the substance of the relationship. In GKN Co. v. Magness, 744 N.E.2d 397, 402 (Ind. 2001), the court stated, "Determining whether an employer-employee relationship exists ultimately is a question of fact." Despite Taxpayer setting out and adhering to the formalities of employing independent contractors, these workers are employees. Taxpayer's business is based on a continuous and systematic employment of dealers to work the tables at the events. Despite the fluctuations of business and the turnover of available dealers, Taxpayer's business is integrated to provide gaming equipment and dealers at events. Many dealers have a continuing working relationship with Taxpayer from event to event.

It is understandable based on the fluctuations of business why Taxpayer chose to deem the dealers as independent contractors. But the substance of the relationship is as employer and employee. Taxpayer pays a set hourly rate to the dealers; the dealers do not submit bids for compensation.

The Department has issued Information Bulletin #52, which outlines the tax withholding requirements from part-time, temporary, or seasonal employees. The Bulletin, in all versions, has stated that withholding agents are required to withhold both state income tax and county income tax from the income of all employees, including part-time, temporary, or seasonal employees. The bulletin as states that the fact that the employee will not earn in excess of their \$1,000 exemption has no bearing on the withholding by the withholding agent. As well, the IRS, which allows an employee to waive withholding for federal tax purposes when the income is not expected to exceed the federal filing requirements and income allowances, has no bearing on the withholding of taxes from the income of employees for Indiana tax purposes.

As stated in this letter of findings, the volume and frequency of Taxpayer's business varies. Depending on the size and desires of each event, Taxpayer may need a few gaming tables or many. And each table needs a dealer. As well, the booking of events varies depending upon the time of the year. Taxpayer stated at the hearing, there are times when he has had five events booked for the same day, and at other times, the calendar has had few bookings. But despite the fact that the dealers are employed on a part-time, temporary, or seasonal basis, Taxpayer is required to withhold the state and local income taxes from each employee's wages.

The dealers are employees, not independent contractors; Taxpayer was required to have withheld state and local income taxes and remitted those taxes to the Department.

FINDING

For the reasons stated above, Taxpayer's protest is denied.